Supreme Court, U.S.
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No. ——

In The

Supreme Court of the United States

THOMAS W. GASSER,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of The State Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the petitioner unduly pressured into entering a guilty plea that was involuntary?

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Thomas W. Gasser, petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court and the Appellate Court of the State of Connecticut.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court was rendered on March 25, 2003, and was published at 262 Conn. 954. It is printed as Appendix B to this petition. The opinion of the Connecticut Appellate Court upon which the Connecticut Supreme Court based its ruling was rendered on January 14, 2003, and was published at 74 Conn. App. 527. It is printed as Appendix A to this petition.

JURISDICTION

The Connecticut Supreme Court rendered its decision on the petitioner's appeal on March 25, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law. . . "

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On the evening of October 21, 1998, Thomas Gasser was involved in a head-on motor vehicle collision on Route 149 in East Haddam. He was severely injured and the party in the other vehicle, Dr. Kathleen J. McShane, was killed. Mr. Gasser was arrested in March of 1999 and charged with manslaughter in the second degree with a motor vehicle, in violation of Section 53a-56b of the Connecticut General Statutes.

On December 10, 1999, represented by privately-retained counsel, the petitioner pled guilty to the offense charged. Prior to sentencing, he moved to withdraw that plea on the ground that it was fatally infected by the ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, to which the petitioner had been subjected by the attorney who represented him at and prior to his plea. The court heard evidence on that motion on March 27, 2001, and denied the motion. Mr. Gasser was thereafter sentenced to a term of imprisonment by the judge who took his plea. He appealed and the Connecticut Appellate Court affirmed his conviction on January 14, 2003. *State v. Gasser*, 74 Conn. App. 527 (2003). A timely petition for certification of the appeal was denied by the Connecticut Supreme Court on March 26, 2003. *State v. Gasser*, 262 Conn. 954 (2003).

The petitioner was represented by Attorney David Lenefsky of New York, who testified at the hearing. There

came a time in the course of that representation when Attorney Lenefsky told the petitioner: "We have to enter a plea. It's time to enter a plea and there's nothing to take to trial in this case." (Tr. p. 114) The petitioner begged Attorney Lenefsky to investigate his case further, but Attorney Lenefsky persisted in his urging that there was no defense and the petitioner had no alternative but to plead guilty. (Tr. pp. 114-15)

The petitioner had no memory of the incident itself and he explained that fact to his attorney. (Tr. p. 115)

The petitioner testified further that he never wanted to plead guilty and did so only because of excessive pressure from his attorney. (Tr. pp. 139-40)

Attorney Lenefsky testified that he has been practicing law in Manhattan since 1963. (Tr. p. 61) He is an authority particularly in the area of international law, a subject in which he received an LLM from NYU law school and on which he has published extensively. (Tr. pp. 62, 76) He also has handled criminal cases during his career. (Ibid.) He is not a member of the Connecticut bar, but was admitted *pro hac vice* in this case. (Ibid.)

Attorney Lenefsky testified that "in retrospect I'm quite clear that I should not have allowed Tom to take this plea. . . . I'm quite clear that Tom did not want to take this plea and I don't know how else to express this but I think for a lack of a better phraseology that I have a forceful personality. I'm a dominating personality. I thought I knew what was in Tom's interest and he didn't, and I believe Tom should have had the right to make a mistake." (Tr. p. 66) He added: "I believe that in a sense Tom's plea was involuntary in that I was too forceful and too dominating the discussion. . . . I believe the forcefulness of and the

intensity of my personality dominated Tom beyond the point where it should have." (Tr. pp. 68, 72)

On September 11, 2001, the court denied the petitioner's motion, holding *inter alia*, that "[t]he defendant . . . was not forced or pressured into entering a plea on December 10, 1999 and thus his plea was voluntary [*sic*] entered."

Affirming, the Connecticut Appellate Court, addressing this claim, said only that the petitioner's affirmative response at the guilty plea canvas to the question: "No one's forcing you to plead guilty by use of a threat or intimidation or anything like that?" sufficiently trumped the hearing testimony of both the petitioner and his attorney. 74 Conn. App. at 535.

The Connecticut Supreme Court denied certification without an opinion.

REASONS FOR GRANTING THE WRIT

A guilty plea is involuntary when it is the product of any form of "wrongful coercion." *United States v. Hernandez*, 203 F.3d 614, 626 (9th Cir. 2000). Whether a guilty plea has been coerced may not be decided merely by reviewing the plea colloquy in isolation. "[A] reviewing court must examine the *totality* of circumstances surrounding the plea." *United States v. Anderson*, 993 F.2d 1435, 1437 (9th Cir. 1993) (emphasis supplied).

Here, the plea colloquy upon which the Connecticut courts relied for their ruling did not truly address the issue at hand. The court's question to the petitioner was whether he had been subjected to "a threat or intimidation or anything like that" and by not fully exploring the range of ways an involuntary plea can be coerced unlawfully did

not provide any factual basis whatsoever for a finding rejecting the subsequent sworn testimony of both the petitioner and his first attorney.

In this case, the evidence that the petitioner's guilty plea was involuntary and the product of his attorney's admittedly improper coercion was overwhelming. In ignoring that evidence, and basing its affirmance of the petitioner's conviction solely upon his response to a single off-the-point question during the plea colloquy, the Connecticut Appellate Court and the Connecticut Supreme Court violated clearly established law. This ruling, while it applies to the case of but one man, is a case of great public importance because of the violence it does to the essential principle of constitutional government that a waiver of constitutional rights should not lightly be presumed.

Certiorari should be granted to review this important issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Connecticut Appellate Court

App. 1

74 Conn. App. 527

STATE OF CONNECTICUT *v.* THOMAS W. GASSER
(AC 22492)

Lavery, C. J., and Foti and Dranginis, Js.

Syllabus

Convicted of the crime of manslaughter in the second degree with a motor vehicle, the defendant appealed to this court, claiming that the trial court improperly denied his motion to withdraw his guilty plea. *Held* that the trial court did not abuse its discretion in determining that the defendant was not deprived of the effective assistance of counsel in deciding to plead guilty; contrary to the claims made by the defendant, his attorney conducted an adequate investigation into the facts of the case, properly utilized an expert witness to review the state's accident report and did not excessively pressure the defendant to plead guilty.

The defendant failed to present an adequate record for review of his claim that his attorney failed to discuss with him the possibility of obtaining an accident reconstruction expert who would testify that the accident was not the defendant's fault.

Argued October 24, 2002 –
Officially released January 14, 2003

Procedural History

Information charging the defendant with the crime of manslaughter in the second degree with a motor vehicle and with the infraction of failure to drive on the right, brought to the Superior Court in the judicial district of Middlesex, where the court, *O'Keefe, J.*, dismissed the infraction of failure to drive on the right; thereafter, the defendant was presented to the court, *O'Keefe, J.*, on a plea of guilty to manslaughter in the second degree with a motor vehicle; subsequently, the court, *Clifford, J.*, denied the defendant's motion to withdraw the guilty plea; thereafter, the court, *O'Keefe, J.*, rendered judgment in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

John R. Williams, New Haven, for the appellant (defendant).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were Timothy J. Liston, state's attorney, and George Ferko, senior assistant state's attorney, for the appellee (state).

Opinion

LAVERY, C.J. The defendant, Thomas W. Gasser, appeals from the judgment of conviction rendered by the trial court subsequent to his plea of guilty to the charge of manslaughter in the second degree with a motor vehicle in violation of General Statutes § 53a-56b.[1] On appeal, the

[1] General Statutes § 53a-56b (a) provides: "A person is guilty of manslaughter in the second degree with a motor vehicle when, while

(Continued on following page)

defendant claims that the court improperly denied his motion to withdraw his guilty plea because he was denied the effective assistance of counsel during the plea process. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our disposition of the defendant's appeal. The defendant was charged with manslaughter in the second degree with a motor vehicle and failure to drive on the right in violation of General Statutes § 14-230(a).[2] On December 10, 1999, the defendant withdrew his not guilty plea and pleaded guilty to the charge of manslaughter in the second degree with a motor vehicle.[3] At that time, the defendant was represented by attorney David Lenefsky, a member of the New York bar who had been admitted pro hac vice[4] for the purpose of representing the defendant in

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operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as a consequence of the effect of such liquor or drug."

[2] In its memorandum of decision denying the defendant's motion to withdraw the guilty plea, the court found the following facts underlying the plea. "This case involves a two car motor vehicle accident in East Haddam which resulted in the death of the driver of the other vehicle. The defendant, operator of his vehicle, was removed from his truck by a witness who told police that the vehicle 'reeked' of alcohol. The defendant was flown by Life Star helicopter to Hartford Hospital for treatment. A treating physician at the hospital noticed a distinct odor of alcohol on the defendant's breath. Records later obtained from the hospital showed that the defendant had a blood alcohol level of 0.18 [percent]. The state's investigation determined that the vehicle operated by the defendant had veered into the opposite lane, striking the victim's vehicle head on."

[3] The court subsequently dismissed the charge of failure to drive on the right.

[4] Practice Book § 2-16 provides in relevant part: "An attorney who is in good standing at the bar of another state . . . may, upon special and

(Continued on following page)

the criminal matter. The plea bargain that the state disclosed to the court contemplated a sentence of ten years, execution suspended after seven years, a period of probation, and the right for the defendant to argue for a lesser sentence on behalf of the defense.

Prior to accepting the defendant's plea, the court engaged in a lengthy canvass of the defendant pursuant to Practice Book §§ 39-19 through 39-21. The court read a recital of the facts of the case, and the defendant conceded that he generally knew what the evidence would have been had there been a trial.[5] The defendant acknowledged that at the time of his canvass, he was not under the influence of any alcohol, drugs or medication. Additionally, the court reviewed the elements of manslaughter in the second degree with a motor vehicle, as well as the rights that the defendant waived by pleading guilty. The court informed the defendant that he would not be able to withdraw his plea without permission. The defendant acknowledged that he was pleading guilty of his own volition and that no one had forced him to do so. The court

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infrequent occasion and for good cause shown upon written application presented by a member of the bar of this state, be permitted in the discretion of the court, to participate to such extent as the court may prescribe in the presentation of a cause or appeal in any court of this state. . . ."

[5] The defendant stated that he had no memory of the accident, and that he had heard rumors that the victim suffered a heart attack while driving. Both the court and attorney Lenefsky told him that this rumor was "wishful" thinking on the defendant's part. The office of the chief medical examiner issued an autopsy report that concluded that multiple blunt force trauma caused the death of the victim. The defendant conceded that if there had been a trial, he would have been convicted.

accepted the plea after concluding that it was entered into knowingly and voluntarily, and was made with the assistance of competent counsel.

On March 3, 2000, prior to the sentencing hearing, attorney John R. Williams, a member of the Connecticut bar, filed an appearance on behalf of the defendant. On the same day, the defendant filed a motion to withdraw the plea and claimed that he had been denied the effective assistance of counsel.

After conducting an evidentiary hearing, the court denied the defendant's motion. Specifically, the court found that Lenefsky's representation did not fall below an objective standard of reasonableness and that the defendant voluntarily had pleaded guilty. The court thereafter rendered judgment of guilty and sentenced the defendant to a period of incarceration of ten years, suspended after five years, with five years of probation with special conditions. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant renews his claims that the court improperly denied his motion to withdraw his guilty plea, which motion he made pursuant to Practice Book § 39-27 and in which he asserted that he had been denied the effective assistance of counsel.[6] The defendant claims that Lenefsky's representation fell below the range of

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[6] Practice Book § 39-27 provides in relevant part: "The grounds for allowing the defendant to withdraw his or her plea after acceptance are . . .

"(4) The plea resulted from the denial of effective assistance of counsel. . . ."

competence of a lawyer with ordinary training in the field of criminal law. Specifically, the defendant argues that Lenefsky (1) failed to conduct an adequate investigation of the facts of the case, (2) failed to obtain a full accident reconstruction by an independent expert, (3) failed to communicate to him the availability of an expert who would testify that the accident was not caused by the defendant and (4) excessively pressured him into pleading guilty. We disagree.

At the outset, we must identify the applicable standard of review and set forth the legal framework that guides our resolution of the defendant's appeal. "[O]nce entered, a guilty plea cannot be withdrawn except by leave of the court, within its sound discretion, and a denial thereof is reversible only if it appears that there has been an abuse of discretion. . . . The burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Andrews,* 253 Conn. 497, 505-506, 752 A.2d 49 (2000). "We further note the pertinent case law applicable to ineffective assistance of counsel claims brought under Practice Book § 39-27(4). Our case law holds that [a] claim of ineffective assistance of counsel is generally made pursuant to a petition for a writ of habeas corpus rather than in a direct appeal . . . . Section 39-27 of the Practice Book, however, provides an exception to that general rule when ineffective assistance of counsel results in a guilty plea. A defendant must satisfy two requirements . . . to prevail on a claim that his guilty plea resulted from ineffective assistance of counsel. . . . First, he must prove that the assistance was not within the range of competence displayed by lawyers with ordinary training and skill in criminal law. . . . Second, there must exist such

an interrelationship between the ineffective assistance of counsel and the guilty plea that it can be said that the plea was not voluntary and intelligent because of the ineffective assistance." (Internal quotation marks omitted.) *State* v. *Nelson,* 67 Conn.App. 168, 177, 786 A.2d 1171 (2001); *State* v. *Gray,* 63 Conn.App. 151, 161-62, 772 A.2d 747, cert. denied, 256 Conn. 934, 776 A.2d 1151 (2001).

"In choosing to plead guilty, the defendant is waiving several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. . . . These considerations demand the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences. . . . We therefore require the record affirmatively to disclose that the defendant's choice was made intelligently and voluntarily." (Citations omitted; internal quotation marks omitted.) *State* v. *Andrews,* supra, 253 Conn. at 503, 752 A.2d 49. With those principles in mind, we now address the defendant's arguments.

A

The defendant first argues that Lenefsky failed to conduct an adequate investigation into the facts of the case. The defendant claims an adequate investigation by Lenefsky was of particular importance in this case because the defendant had no recollection of the accident. We have previously noted the United States Supreme Court's cautionary advice in *Strickland* v. *Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [defendant]

to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [defendant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Fuller* v. *Commissioner of Correction,* 66 Conn.App. 598, 601, 785 A.2d 1143 (2001).

At the evidentiary hearing, Lenefsky testified that he had numerous discussions with the defendant and his family. He stated that he reviewed the materials that he obtained during pretrial discovery, including various police and medical reports, as well as statements from witnesses. Lenefsky discussed the case with medical experts and engineers. As part of his investigation, Lenefsky went to and examined the accident scene and obtained a psychiatric evaluation for the defendant. He utilized local counsel to assist with Connecticut procedure and reviewed the relevant statutes. On the basis of that conduct, we agree with the court that Lenefsky's actions in investigating the

accident involving the defendant did not fall below an objective standard of reasonableness.

B

The defendant next argues that Lenefsky failed to obtain an independent accident reconstruction expert. Lenefsky, however, utilized an expert witness to review the state's report detailing the accident, although he did not want the expert to produce a written report.[7] After reviewing the information with the expert, Lenefsky concluded that although he would be able to attack the state's accident report at trial, ultimately, that was, on the basis of his experience, not a triable issue. On the basis of that evidence, we conclude that the court properly found that Lenefsky's actions did not fall below an objective standard of reasonableness.

C

The defendant next argues that Lenefsky failed to communicate to him the availability of an expert who would testify that the defendant did not cause the accident. The defendant initially testified that Lenefsky never informed him that it would be possible to obtain an accident reconstruction expert who would testify that the accident was not the defendant's fault. Later, the defendant stated that he and Lenefsky did in fact discuss the

[7] The defendant's legal expert testified that he would not have unfavorable findings from an expert reduced to writing because they "would have to be disclosed to the opposing party."

possibility of hiring such an expert.[8] The court, in its memorandum of decision, did not address whether the defendant and Lenefsky discussed the possibility of using an expert witness to testify. The state asserts that the record, therefore, is inadequate for review of the defendant's argument. We agree with the state and do not address the claim.

It is the duty of the defendant in this case to provide us with an adequate record to review his claims. Practice Book §§ 60-5 and 61-10. "A lack of pertinent factual findings and legal conclusions will render a record inadequate . . . . Similarly, ambiguity in a record can render it inadequate." (Citation omitted.) *State* v. *Salerno,* 36 Conn.App. 161, 165, 649 A.2d 801 (1994), appeal dismissed, 235 Conn. 405, 666 A.2d 821 (1995). We cannot speculate as to the factual determination of whether Lenefsky failed to communicate to the defendant the possibility of obtaining an accident reconstruction expert. We therefore decline to review the claim because the

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[8] The following colloquy occurred between the defendant and defense counsel during the evidentiary hearing on the motion to withdraw the defendant's guilty plea:

"Q. Did attorney Lenefsky ever tell you that it would be possible or might be possible that even it might be possible to find an expert who would say, like, the accident happened in your lane of travel, not the [victim's] lane? Did he ever tell you that?

"A. No, he never did.

"Q. Did he ever discuss that either such a thing could be done?

"A. No, he didn't. When he discussed it . . . I brought it up. That's the only time we ever talked about [an] investigation team."

defendant has not presented an adequate record for its review.

D

The defendant's final argument is that Lenefsky excessively pressured him into entering a plea of guilty. At the plea hearing, the following colloquy occurred between the court and the defendant:

> "The Court: No one's forcing you to plead guilty by use of a threat or intimidation or anything like that?
>
> "[The Defendant]: No.
>
> "The Court: This is your choice to resolve the case in this way?
>
> "[The Defendant]: Yes.
>
> * * *
>
> "The Court: . . . But do you have any reason to disbelieve the advice of your attorney, which, obviously –
>
> "[The Defendant]: No.
>
> "The Court: – is to resolve this case, on the best terms you can, by agreement.
>
> "[The Defendant]: I have no question about it."

"It is well established that [a] trial court may properly rely on . . . the responses of the [defendant] at the time [he] responded to the trial court's plea canvass. . . . " (Internal quotation marks omitted.) *State* v. *Silva*, 65 Conn.App. 234, 252, 783 A.2d 7, cert. denied, 258 Conn. 929,

783 A.2d 1031 (2001). Moreover, during the evidentiary hearing, the defendant testified that Lenefsky did not intimidate him into pleading guilty. We conclude, therefore, that the court did not abuse its discretion when it found that Lenefsky did not excessively pressure the defendant into pleading guilty.

On the basis of the record before us, including the testimony from the evidentiary hearing, we are unable to conclude that the court abused its discretion when it found that Lenefsky's actions did not fall below an objective standard of reasonableness.

The judgment is affirmed.

In this opinion the other judges concurred.

APPENDIX B

Opinion of Connecticut Supreme Court

262 Conn. 954

STATE OF CONNECTICUT *v.* THOMAS W. GASSER

The defendant's petition for certification for appeal from the Appellate Court, 74 Conn. App. 527 (AC 22492), is denied.

KATZ, J., did not participate in the consideration or decision of this petition.

John R. Williams, in support of the petition.

Margaret Gaffney Radionovas, senior assistant state's attorney, in opposition.

Decided March 11, 2003

Filed March 25, 2003